No. 92-1987

IN THE
Supreme Court of the United States

October Term, 1992

CARNIVAL CRUISE LINES, INC.,

Petitioner,

v.

SUSAN MORTON and WILLIAM MORTON,

Respondents.

BRIEF FOR RESPONDENTS SUSAN MORTON AND WILLIAM MORTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Was the court below correct in holding that when a paying passenger traveling aboard an ocean common carrier's vessel is raped by a member of the crew into whose care the common carrier has placed her for safe carriage, the resulting damages are to be borne by the common carrier rather than the victim?

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The order of the United States Court of Appeals for the Ninth Circuit dated March 17, 1993, denying rehearing and rejecting the suggestion of a rehearing *en banc* is reproduced as an Appendix to this brief.

STATEMENT OF THE CASE

By way of supplementation to Petitioner's Statement of the case, Respondent would add:

There are no American flag vessels offering any cruises from any U.S. port to any foreign port or ports, and this has been the case for many years (Declaration of Ted Parsons, CR67).

When Susan Morton was raped, there existed between Petitioner Carnival Cruise Lines, Inc. and Respondents Morton a relationship of common carrier and passengers respectively (Carnival's Response to Request for Admissions, CR 67).

V. Armand Colson became Carnival's manager in June, 1988. He is "involved in literally every claim that comes across Carnival Cruise Lines." During his service of some 2¼ years with Carnival before the taking of his deposition in September 1990, he had been involved in approximately 15 claims of passengers alleging physical contact by crewmembers, of which 3 were pending and the rest were unfounded and closed (Colson Deposition 9/6/90, p. 51, l. 17-21; p. 52 l. 1-2; p. 53 l. 8-10, 16-22).

In the trial court, Respondents did not claim that Carnival was independently at fault separately and apart from the misconduct of its crewmember-employee, but Respondents did contend that Carnival breached its duty of care, namely its absolute responsibility to keep its passengers free from assault by the crewmembers into whose hands Carnival had delivered the passengers for safe carriage.

Following the Ninth Circuit's reversal of the trial court, Petitioner sought rehearing and suggested rehearing *en banc*. The petition for rehearing was denied, and no judge of the court requested a vote on the suggestion for rehearing *en banc*, which was therefore rejected, Resp. Appx. A.

SUMMARY OF ARGUMENT

In holding Carnival responsible for the misconduct of its crewmember-employee, the Ninth Circuit scrupulously adhered to the precedents of this Court which have governed the obligations of common carriers to paying passengers for over one hundred years, *New Jersey Steamboat Co. v. Brockett*, 121 U.S. 637 (1887); *New Orleans & N.E.R. Co. v. Jopes*, 142 U.S. 18 (1891). This Court *denied* certiorari when presented with an identical matter from the Ninth Circuit, *Pacific S.S. Co. v. Sutton*, 7 F. 2nd 579 (9th Cir. 1925), *cert. den.* 269

U.S. 586 (1926), (Carrier absolutely liable for crewmember rape of passenger).

The rule of absolute common carrier responsibility for misconduct of the personnel of its conveyance against paying passengers established by these cases has never been changed. It was unaffected by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959), which simply determined a "floor" or basic minimum duty owed by shipowners to everyone, and did not involve a paying passenger, a common carrier, crewmember misconduct, or the rights and obligations relating thereto at all. *Kermarec* expressly recognized that there are persons holding status in various "meaningful categories" to whom special rules apply under maritime law, 358 U.S. 632 n.9. One such category is paying passengers.

Not only was the rule of carrier responsibility unchanged by *Kermarec,* but also it *should not* be changed, for the rule is sound as a matter of policy. All of the cruise ships plying between U.S. and foreign ports are foreign-flag vessels. The millions of U.S. citizens who are induced to travel aboard these vessels lose the protection, deterrent effects, and investigatory aid of the U.S. criminal justice system and law enforcement authorities as soon as the vessels leave U.S. waters. Passengers are wholly dependent upon the carrier and its employees for their safety and have no independent authority available to investigate any misdeeds. As a practical matter they will have no redress in the absence of a rule of absolute carrier responsibility for crewmember assaults.

The rule is likewise sound as a matter of policy because enterprise liability is particularly appropriate in cases of intentional crewmember misconduct. Fortunately such occurrences are rare. The shipowners derive vast profits from the U.S. traveling public and can readily insure against responsibility for the few incidents which do occur. However, there is no insurance by which passengers can protect themselves against the damages they will suffer if they are among the unlucky few who become the victims of atrocities such as rape.

In any event, this case is of insufficient national importance to warrant review by this Court. While many people take cruises, hardly any even claim that they have encountered crewmember misconduct, and of those, it appears that only about 10-15 passengers are actually victimized to any degree in an entire year.

REASONS FOR DENYING WRIT OF CERTIORARI

I. The Ninth Circuit Followed The Rulings Of This Court Precisely In Holding That When A Paying Passenger Traveling Aboard An Ocean Common Carrier's Vessel Is Raped By A Member Of The Crew Into Whose Care The Common Carrier Has Placed Her For Safe Carriage, The Resulting Damages Are To Be Borne By The Carrier Rather Than The Victim.

For over 100 years, it has been clearly established that a common carrier is absolutely liable for injuries wrongfully inflicted upon paying passengers *by carrier personnel.* In *New Jersey Steamboat Co. v. Brockett,* 121 U.S. 637 (1887), that basic rule was announced.

Carnival puts a misleading interpretation on what this Court actually said in *Brockett* by asserting that the case stands for the proposition that a common carrier's responsibility for an assault upon a passenger by a crewmember depends upon whether the assault was committed in the scope of the crewmember's employment. A careful reading of the case discloses that this is incorrect.

In *Brockett,* this Court first discussed the *general* rule of employer responsibility, which imposes liability for an employee's act even if unauthorized or forbidden by the employer, when the employee is acting within the scope of employment. Very significantly, this Court next stated,

> "The principle is *peculiarly* (emphasis added) applicable between carriers and passengers, for, as held by the same court in *Stewart v. Brooklyn and C. R.R. Co.,* 90 N.Y. 591, '. . . a common carrier is bound, as far as practicable, to

> protect its passengers, while being conveyed, from violence committed by strangers and co-passengers, and *undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.*' "

(Emphasis added.)

Nothing could be more clear or more concise: injury by third parties, negligence required; injury by crewmember, absolute carrier responsibility.

In pointing out the *peculiar* application of the principle of employer responsibility to common carriers, this Court was indicating that common carriers are *absolutely* responsible for misconduct of their employees against passengers, even when *not* acting within the scope of their employment. Otherwise there would be nothing *peculiar* about a common carrier's responsibility if it were confined to the general rule applicable to other employers under which the employee must be acting within the scope of his employment. The reference to the absolute nature of the carrier's responsibility would likewise be meaningless. What this Court plainly meant was that during the journey, the carrier is absolutely liable for misconduct of its personnel manning the conveyance in which the passenger is being transported, be it ship, train, or otherwise, even if the employee is acting *outside* the scope of his employment.

The reference to responsibility for the misconduct of servants "engaged in executing the contract" affords no escape hatch to Carnival either. This clearly connotes only the carrier's employees manning the conveyance during the journey, and does not imply that they must be actively engaged in some specific task for the carrier to be absolutely responsible for their misconduct. The fact that the miscreant in this case was not in the midst of a specific work shift in the dining salon is of no avail to Carnival. As a crewmember of a ship at sea, the assailant was at all times in the service of the vessel, present for the sole purpose of executing the contract of carriage in conjunction with his shipmates, and bound at all times to be vigilant to act for the safety of the vessel and the care and protection of the passengers.

If he had seen a passenger fall overboard; if he had discovered a leak in the hull; if he had come upon a fire, he was bound to respond. At whatever time and wherever he was, he was under obligations to contribute to the fulfillment of the contract of carriage even if at any given moment they consisted only of being observant or available to act. In short, he was on duty every moment of every day throughout the voyage, engaged in the service of the vessel in executing the contract.

A review of *Stewart, supra,* the New York case cited by this Court as authority for the rule announced, makes it abundantly clear that no scope of employment restriction was intended. Headnote 2 of *Stewart* at 90 N.Y. 588 states,

> "The rule relieving a master from liability for a malicious injury inflicted by his servant, when not acting within the scope of his employment, does not apply between a common carrier of passengers and a passenger."

As the court in *Stewart* observed,

> "In the present case the master had undertaken to transport the plaintiff safely. He was injured while on the defendant's car by the act of the agent to whom the defendant had entrusted execution of the contract. It is the defendant's failure to carry safely that constituted the breach, and it is no defense to say that that failure was the result of the willful or malicious act of the servant."

Id. at 592.

A subsequent decision makes it indisputable that the rule of absolute responsibility announced in *Brockett* was not qualified by any scope of employment restriction.

The rule of absolute common carrier liability was brought ashore and again expressed by this Court in *New Orleans & N.E.R. Co. v. Jopes,* 142 U.S. 18 (1891), wherein a train passenger had been shot by a conductor. Said the Court,

> "... the carrier is liable for every conceivable wrongful act done to a passenger by its ... employees while they are engaged in transporting him, no matter how willful and malicious the act may be, or how plainly it may be apparent from its nature that it could not have been done in furtherance of the carrier's business (citations omitted)."
>
> "In most cases in which an injury done by an employee has been the cause of the litigation, the defense has been, not that the act of the employee was lawful, but that it was a wanton and willful act on his part, outside the scope of his employment, and therefore something for which his employer was not responsible; and if the act was of that character, the general rule is that the employee alone, and not the employer, is responsible. But owing to the peculiar circumstances which surround the carrying of passengers, as stated, a more stringent rule of liability has been cast upon the employer; and he has been held liable although the assault was wanton and willful and outside the scope of the employment."

142 U.S. at 26–27.

Moreover, when an ocean common carrier brought an identical Ninth Circuit case of crewmember rape to this Court, certiorari was denied, *Pacific S.S. Co. v. Sutton,* 7 F.2d 579 (9th Cir. 1925), *cert. den.* 269 U.S. 586 (1926). Female passengers are no less deserving of redress for the atrocity of rape today than they were then. Carnival's Petition should meet with the same response which this Court gave to the carrier in *Sutton.* It should be denied.

II. The Standard Of Reasonable Care Applied In Maritime Negligence Cases Was Neither Applicable To Nor Undermined By The Ninth Circuit's Decision In This Case Of Intentional Injury To A Paying Passenger By A Crewmember Aboard A Common Carrier's Vessel.

Brockett and its progeny have never been overruled or modified, certainly not by *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). In *Kermarec,* a crewmember's friend aboard

defendant's vessel for a social visit, was injured when he fell on a defective canvas runner while descending a stairway. The trial court applied state law, with its old common law distinctions of different degrees of care owed to invitees, licensees, and trespassers, and set aside a jury verdict in the plaintiff 's favor on the grounds that the plaintiff had not proven the shipowners' actual knowledge of the dangerous condition, which under New York law as a licensee he was required to do.

The issue addressed by this Court was simply whether the presence or absence of negligence on the part of the shipowner should be determined under the old common law distinctions between invitees, licensees, and trespassers with their fine-spun sub-classifications and attendant confusion, or under a simple rule of reasonable care under the circumstances toward all persons lawfully aboard. Said this Court, "Stated broadly, the decisive issue is thus whether admiralty recognizes the same distinctions between an invitee and a licensee as does the common law." *Kermarec* was just a garden variety slip-fall negligence case, and this Court chose the simple rule for *maritime negligence* cases, rather than adopting the status distinctions used to determine the degree of care owed in *common law negligence* cases.

Kermarec had nothing to do with a paying passenger. *Kermarec* had nothing to do with a passenger at all.

Kermarec had nothing to do with an injury inflicted by a crewmember. *Kermarec* had nothing to do with a crewmember at all.

Kermarec had nothing to do with an intentional injury. The common carrier's absolute responsibility for intentional injuries of paying passengers by crewmembers was not even remotely involved, much less discussed. Nowhere in *Kermarec* is there the slightest intimation that this Court intended to abolish the carrier's existing absolute responsibility in a case of intentional mistreatment of passengers by crew, which is not a negligence case at all. This Court merely adopted a simple rule of reasonable care for maritime *negligence*

cases, rather than the complex status-dependent rules traditionally applied in shoreside *negligence* cases.

When Carnival's presentation is analyzed, it is evident that it comes down to the following proposition: This Court said in *Kermarec* that a shipowner does owe to *all* who are on board his vessel a duty of reasonable care under the circumstances. By affirmatively imposing at least this minimum obligation upon shipowners in favor of *all* persons, this Court intended to take away (according to Carnival) all greater obligations which already existed in favor of *some* persons; to overrule (without bothering to say so) every precedent of this Court which had previously imposed greater obligations in favor of *some* persons; and to disapprove all lower court progeny to that effect as well.

This is demonstrably absurd, but this is exactly what Carnival is saying: by *granting* a minimum right to all, this Court purportedly meant to take away other rights from some. Nowhere does this Court say such a thing in *Kermarec*. This Court is perfectly capable of saying what it intends, especially if it intends to overrule fundamental principles of maritime law.

In any event, by a few simple illustrations, the fallacy of Carnival's contention is readily exposed. For example, when *Kermarec* was decided, it was already well established since *The Osceola*, 189 U.S. 58 (1903) that seamen injured aboard a vessel by unseaworthiness had an absolute right to recover damages from the shipowner, irrespective of the presence or absence of shipowner's negligence. Even in the absence of negligence or unseaworthiness, a seaman injured aboard a vessel had an absolute right to recover maintenance and cure from the shipowner. Masters also had an absolute right to recover damages for unseaworthiness, as well as maintenance and cure. So did ships officers. So did persons employed aboard by shipboard concessionaires.

There was also absolute liability to various categories of transient vessel visitors for injuries caused by unseaworthiness, *Seas*

Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1946), such as longshoremen, ship repairmen, marine carpenters, marine surveyors, ship's pilots — the list could go on and on.

Shipowner's absolute liability likewise existed to paying passengers for injuries caused by intentional misconduct of crewmembers. *New Jersey Steamboat Co. v. Brockett, supra.*

By granting a negligence cause of action in *Kermarec* to *everyone* injured aboard a vessel, did this Court intend to abolish all other rights of recovery which it had previously created under general maritime law over the course of many decades? To take away the unseaworthiness vehicle from the many persons then entitled to use it? To strip maintenance and cure from seamen? To destroy passengers rights of redress if brutalized by vessel crewmembers? Of course not. Congress took away some recovery rights from some categories of injury victims by the 1972 amendments to 33 U.S.C. § 905(b) of the Longshoremen's and Harborworker's Compensation Act, but this Court never did. And no one, not this Court, not Congress, not anyone, ever took from paying passengers the special rights which they had, and have to this day — to recover damages from the shipowner if they are raped, assaulted, or otherwise intentionally mistreated by the shipowner's crewmembers in whose care they are traveling.

In fact, as recognized by the Ninth Circuit, this Court in *Kermarec* plainly indicated that the minimum duty of care owed by a shipowner to everyone was not all-encompassing, and that greater duties were owed to persons holding status in various "meaningful categories," *Id.* 358 U.S. at 32 n.9. This Court referred to the status of seamen as simply an example, making obvious the existence of other "meaningful categories" such as paying passengers.

Petitioner's presentation is grossly inaccurate in asserting that the Ninth Circuit purported by its ruling to make carriers absolutely liable for *all* mishaps suffered by passengers, and thereby disrupted the uniformity of maritime law. The Ninth Circuit did no such thing.

It simply held that a common carrier is absolutely liable for a passenger's injury in only one narrow situation: when the injury was the result of an assault upon the passenger by a member of the crew into whose care the carrier had placed her for safe carriage. This has nothing to do with a trip-fall such as in *Kermarec,* tumbles over bar stools, stubbing of toes on protruding screws, or the sundry other unintended mishaps giving rise to the assortment of cases referred to by Carnival. Carnival's attempt to manufacture a non-existent conflict between *Kermarec* and other unintentional injury cases on the one hand, and the Ninth Circuit's decision in this case of crewmember assault upon a passenger, mixes the proverbial apples and oranges, and affords no basis for granting *certiorari.*

III. The Ninth Circuit's Decision Is In Harmony With The Decisions Of Other Circuits Dealing With Intentional Misconduct Of Common Carrier Employees Against Passengers.

In the Second Circuit, in *The Minnetonka,* 146 Fed. 509 (2nd Cir. 1906), the court applied the rule of *Brockett* in holding that the shipowner would be absolutely liable for intentional wrongdoing of a crewmember against a passenger, in that case theft of a passenger's jewelry. The court made short shrift of the shipowner's attempt to disclaim responsibility for intentional misconduct of a crewmember as being outside the scope of his employment.

The court illustrated the injustice of such a rule as follows:

> "If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable, but if the guardian himself turned pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts."

The Court rejected such an absurd proposition, observing,

> "The carrier selects his own servants and agents, and, we think, he must be held to warrant that they are trustworthy as well as skillful and competent."

Likewise, the rule of absolute carrier responsibility for crew misconduct against passengers has the approval of the Fifth Circuit. In *Tullis v. Fidelity and Casualty Company of New York,* 397 F. 2d (5th Cir. 1968), the court noted,

> "The principles involving liability to passengers differ little from those in use ashore. The liability is negligence with the *only apparent exception being the unconditional responsibility of the carrier for the misconduct of the crew toward the passengers.*"

(Emphasis added).

Absolute responsibility for intentional misconduct of crewmembers is imposed in the First Circuit as well. In *Muratore v. M/S SCOTIA PRINCE,* 845 F.2d 347 (1st Cir. 1988), the plaintiff passenger was subjected to humiliating remarks and rude pranks by shipboard photographers, and suffered emotional distress. In affirming the district court's finding of carrier *liability* for intentional misconduct of these crewmembers against plaintiff, the First Circuit observed, "As correctly stated by the district court, a maritime carrier has 'an unconditional responsibility for the misconduct of its people toward the passengers.' " 845 F.2d at 353. The court later noted that the carrier had no actual or constructive knowledge of the crewmembers' misconduct, did not ratify it, had not encouraged it; and that there was no evidence that there was any prior "track record" whereby a reasonably conscientious carrier would have had reason to suspect that they would harass passengers on the voyage, *Id.* at 355, so it is clear that *liability* was imposed on the carrier, not on negligence grounds, but on the basis of absolute carrier liability for crewmember misconduct.

The First Circuit then turned to the topic of the amount of compensatory *damages* awarded. At this point, the court considered *Kermarec,* but only for the purpose of evaluating the *amount* awarded by determining the extent to which the treatment which the passenger received deviated from the level of courtesy and consideration to which she was entitled, using "reasonable care under the

circumstances" to establish that level. The carrier apparently contended that the district court had awarded an excessive amount of damages by applying the "highest degree of care" standard found in some maritime passenger cases, thus setting the level of expectable courtesy too high, in turn leading to an excessive discrepancy between the courtesy due and the treatment received, with assessment of correspondingly excessive damages. The First Circuit determined that the trial court had properly used the *Kermarec* reasonable care standard to measure *damages* and rejected the carrier's contention. The important point is that *Muratore* is an absolute liability case, and that the court only applied *Kermarec* in measuring the *amount of damages*.

The leading maritime treatises likewise uniformly agree that there is absolute responsibility for misconduct by a carrier's crewmember employees.

> "Rape, indecent assault or molestation of a passenger by an employee in the service of the ship is contrary to the duty of the carrier to carry safely and to protect the passenger from harm."

Norris, Maritime Personal Injuries, 3rd, P. 78.

> "If the passenger is harmed by an employee in the service of the ship in contravention of the duty of safe carriage, the carrier cannot plead as a defense that the employee acted willfully, maliciously and outside the scope of his employment."

Norris, supra, at page 78.

To the same effect is *Gilmore and Black, Law of Admiralty,* 2d, p. 23, note 77, referring to

> "the unconditional responsibility of the carrier for misconduct of his people toward the passengers."

Also in accord is *Schoenbaum, Admiralty and Maritime Law,* (1987) page 128:

> "The shipping line is liable without negligence if the injury to a passenger is caused by the intentional misconduct of the crew."

The rule of absolute carrier responsibility for intentional crew misconduct is also well summarized by 14 Am. Jur.2d §908, with a host of authorities set forth in the accompanying notes:

> ". . . it has been held in some of the earlier cases that an act not within the line of the employee's duty or the real or apparent scope of his authority cannot fasten upon the carrier liability for injury resulting therefrom, unless authorized or ratified by the carrier.
>
> "In many cases, however, including later ones on the subject, the liability of a common carrier for tortious acts of its employees causing injury to passengers has not been predicated upon or limited to the doctrine of *respondeat superior* but has been based upon the legal obligation imposed upon the carrier to protect its patrons while in its charge from willful or negligent injury. Under this theory, which is now widely accepted, it is of no consequence when the wrong is committed by the carrier's employee that the act bears no connection or relation with the duties of such employee to the carrier and is not committed as an incident to the discharge of any duty, but is entirely outside the scope of his employment or even in disobedience of the carrier's orders. It has been said pursuant thereto, that a carrier of passengers, as part of its contract of carriage, must protect its passengers from all tortious acts of its employees, and for a breach of this contract, however, occasioned, a passenger may recover. Accordingly, under this theory a carrier is liable for injuries sustained by a passenger as a result of the willful, wanton, or malicious acts of its employees, including assaults by its employees upon the person of a passenger, even though not authorized by the carrier and outside the line of duty of the employee or the scope of his employment. Insofar as the liability of a carrier for the tortious acts of its employees is concerned, the motive of the employee is immaterial, so that it makes no difference that it is one of private retribution on the part of the employee, impelled by personal malice toward the

passenger and without any attribute of service to the carrier."

The Ninth Circuit's ruling is consistent with all of the pertinent authorities and should not be disturbed.

IV. The Rule Followed By The Ninth Circuit Is Sound As A Matter Of Policy And Should Not Be Changed, But In Any Event It Has No Significant National Importance Sufficient To Warrant Review.

Passengers on a ship sailing upon the high seas, are wholly and solely dependent upon the common carrier and its employes for everything, even for the safety of their very lives. If they are not fed, they cannot walk down the street to a restaurant. If their accommodations are uninhabitable, they cannot call a cab and go to another hotel. If they are not well treated by the people for whose services they have paid the carrier, they cannot walk out their cabin door and go to another establishment. Most critical of all, when an American traveler enters a hotel in the Port of San Pedro, California, or anywhere else in the United States, she is protected by the law enforcement authorities and criminal justice system of her country. When she steps aboard Petitioner's Liberian-flag cruise ship as Respondents did at San Pedro, California, she is in effect at best unwittingly entering Liberia, and in reality, stepping into a domain where there is no public law enforcement authority, and no criminal justice system.

The consequences are manifold. The passenger becomes wholly dependent upon the common carrier and its crewmember employees, for safety. There is no criminal justice system deterrent to criminal misconduct. The passengers are fair game for any crewmember miscreant.

When a passenger is victimized by a crewmember, unlike a hotel guest, a passenger cannot call police to apprehend the perpetrator, and there is no public authority available to make an unbiased, reliable investigation of the facts. Since all cruise ships are foreign flag

vessels, manned by foreign nationals primarily from Third World countries where they cannot be traced, much less subjected to criminal penalties, they go scot free. Intentional misdeeds by crewmembers are typically surreptitious. For proof of facts and circumstances, a passenger victim is dependent upon vessel personnel, but they are by definition transient, and typically either gone, or at best widely scattered about the oceans on vessels even if still employed by the involved carrier. The carrier is hardly motivated to inculpate itself by investigating impartially and disclosing the results. The practical reality is that if passenger victims are required to prove that they were assaulted because of negligence of the carrier itself separate and apart from the conduct of the assailant, they will generally be left without redress.

If the rule of absolute carrier responsibility for the intentional mistreatment of passengers by carrier crewmembers were changed, the practical effect would be that the resulting damages would fall upon the victims, who cannot insure against the pain and suffering, and havoc wrought upon their lives. Enterprise liability is particularly appropriate as a matter of policy when victims cannot protect themselves by insurance, but the enterprise can. The carriers participating in the giant cruise ship industry, all foreign flag, can insure against such damages. The cruise ship business is a major and growing industry, and it can well afford to provide itself with insurance to compensate its customers who are raped or otherwise assaulted by its shipboard personnel. During the years 1987–1989, Carnival itself transported a huge number of passengers from U.S. ports, see *Partesi v. Carnival Cruise Lines,* 1991 AMC 1401, 1402, note 2 (D.N.J. 1990) indicating that Carnival transported 52,524 passengers from New Jersey alone, constituting only 3–4% of its business.

If New Jersey passengers made up 3%, this would equate to about 1,749,000 passengers or about 580,000 per year. If New Jersey contributed 4%, the figures would be about 1,313,000 in all, or 437,000 per year. In its brief, Carnival quotes recent annual passenger figures of 4,000,000 for the entire industry, so Carnival's share appears to be 10–15% even if its business has not increased since

1989. Plainly there are ample revenues for Carnival and the other members of the industry to spread the risk by insuring against responsibility for the damages suffered by the unfortunate few who are victimized by crewmember misconduct.

While many people go on cruises, and while the consequences of crew misconduct can be catastrophic for the few passengers who are victimized, nevertheless this case has no national importance because fortunately such incidents are very, very rare. The deposition testimony of Carnival's claims manager indicates only 6 or 7 claims of improper crew member contact per year, of which only 20% turn out to be well-founded. If Carnival's market share is 10–15%, this suggests a frequency of only about 50–70 *claims* per year for the entire industry, with only about 20% or 10–15 proving to be factual, from 4,000,000 passengers carried. Even if 10–15 people per year are affected by actual incidents, some may be seriously harmed, but the consequences to some will be trivial. The import of this case to the nation in general, the traveling public, and the cruise ship industry is plainly minimal and insufficient to justify review.

This case is of major import only to the two respondents who have been gravely harmed by the misconduct of Carnival's employee, and who have been pleading for their day in court for over four years now. They should have that day as quickly as possible.

CONCLUSION

This Court should deny Carnival's Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SUSAN MORTON; WILLIAM MORTON,

Plaintiffs-Appellants,

v.

JOAQUIN MARTINS DE OLIVEIRA, and CARNIVAL CRUISE LINES, INC.,

Defendants-Appellees.

No. 91-55125

D.C. No. CV-90-0315-WMB

ORDER

FILED

MAR 17 1993

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

BEFORE: BRUNETTI, O'SCANNLAIN, and T.G. NELSON, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.